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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals, MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

PUBLIC COPY

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[redacted]

FILE: [redacted] Office: NEBRASKA SERVICE CENTER Date: NOV 18 2009

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IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center, denied the employment-based immigrant visa petition, which is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a non-profit research hospital. It seeks to employ the beneficiary permanently in the United States as a research lab specialist pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2). As required by statute, an ETA Form 9089, Application for Alien Employment Certification, approved by the Department of Labor (DOL), accompanied the petition. Upon reviewing the petition, the director determined that the beneficiary did not satisfy the minimum level of work experience stated on the labor certification. Specifically, the director determined that the he could not overlook the terms of the certified ETA Form 9089 and thus, the petitioner had not established that the beneficiary possessed eight years of work experience as a research lab specialist prior to the December 28, 2005 priority date.

The record shows that the appeal is properly filed and timely and makes a specific allegation of error in law or fact. The procedural history in this case is documented by the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

In pertinent part, section 203(b)(2) of the Act provides immigrant classification to members of the professions holding advanced degrees or their equivalent and whose services are sought by an employer in the United States. An advanced degree is a United States academic or professional degree or a foreign equivalent degree above the baccalaureate level. 8 C.F.R. § 204.5(k)(2). The regulation further states: "A United States baccalaureate degree or a foreign equivalent degree followed by at least five years of progressive experience in the specialty shall be considered the equivalent of a master's degree. If a doctoral degree is customarily required by the specialty, the alien must have a United States doctorate or a foreign equivalent degree." *Id.*

The AAO maintains plenary power to review each appeal on a *de novo* basis. 5 U.S.C. § 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); *see also, Janka v. U.S. Dept. of Transp.*, NTSB, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's *de novo* authority has been long recognized by the federal courts. *See, e.g. Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.[1]

The primary issue in the present matter is whether the beneficiary satisfies the minimum level of work experience stated on the labor certification.

[1] The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by the regulation at 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

As noted above, the ETA Form 9089 in this matter is certified by DOL. DOL's role is limited to determining whether there are sufficient workers who are able, willing, qualified and available and whether the employment of the alien will adversely affect the wages and working conditions of workers in the United States similarly employed. Section 212(a)(5)(A)(i) of the Act; 20 C.F.R. § 656.1(a).

It is significant that none of the above inquiries assigned to DOL, or the remaining regulations implementing these duties under 20 C.F.R. § 656, involve a determination as to whether or not the alien is qualified for a specific immigrant classification or even the job offered. This fact has not gone unnoticed by federal circuit courts. *See Tongatapu Woodcraft Hawaii, Ltd. v. Feldman,* 736 F. 2d 1305, 1309 (9th Cir. 1984); *Madany v. Smith*, 696 F.2d 1008, 1012-1013 (D.C. Cir. 1983).

Relying in part on *Madany*, 696 F.2d at 1008, the U.S. Federal Court of Appeals for the Ninth Circuit (Ninth Circuit) stated:

> [I]t appears that the DOL is responsible only for determining the availability of suitable American workers for a job and the impact of alien employment upon the domestic labor market. It does not appear that the DOL's role extends to determining if the alien is qualified for the job for which he seeks sixth preference status. That determination appears to be delegated to the INS under section 204(b), 8 U.S.C. § 1154(b), as one of the determinations incident to the INS's decision whether the alien is entitled to sixth preference status.

K.R.K. Irvine, Inc. v. Landon, 699 F.2d 1006, 1008 (9th Cir. 1983). The court relied on an amicus brief from DOL that stated the following:

> The labor certification made by the Secretary of Labor ... pursuant to section 212(a)[(5)] of the ... [Act] ... is binding as to the findings of whether there are able, willing, qualified, and available United States workers for the job offered to the alien, and whether employment of the alien under the terms set by the employer would adversely affect the wages and working conditions of similarly employed United States workers. *The labor certification in no way indicates that the alien offered the certified job opportunity is qualified (or not qualified) to perform the duties of that job.*

(Emphasis added.) *Id.* at 1009. The Ninth Circuit, citing *K.R.K. Irvine, Inc.*, 699 F.2d at 1006, revisited this issue, stating: "The INS, therefore, may make a *de novo* determination of whether the alien is in fact qualified to fill the certified job offer." *Tongatapu,* 736 F. 2d at 1309.

The petitioner must demonstrate the beneficiary's eligibility as of the priority date, the day the ETA Form 9089 was accepted for processing by the DOL. *See* 8 C.F.R. § 204.5(d); 8 C.F.R. § 103.2(b)(12); *Matter of Wing's Tea House*, 16 I&N Dec. 158 (1977); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg. Comm. 1971). In the instant matter, the receipt date for the ETA Form 9089 is December 28, 2005.

The key to determining the job qualifications is found on ETA Form 9089, Part H. This section of the application for alien labor certification, "Job Opportunity Information," describes the terms and conditions of the job offered. It is important that the ETA Form 9089 be read as a whole.

Crucially, when determining whether a beneficiary is eligible for a preference immigrant visa, U.S. Citizenship and Immigration Services (USCIS) may not ignore a term of the labor certification, nor may it impose additional requirements. *See Madany*, 696 F.2d at 1015. USCIS must examine "the language of the labor certification job requirements" in order to determine what the job requires. *Id.* The only rational manner by which USCIS can be expected to interpret the meaning of terms used to describe the requirements of a job in a labor certification is to examine the certified job offer *exactly* as it is completed by the prospective employer. *See Rosedale Linden Park Company v. Smith*, 595 F. Supp. 829, 833 (D.D.C. 1984) (emphasis added). USCIS's interpretation of the job's requirements, as stated on the labor certification, must involve reading and applying *the plain language* of the alien employment certification application form. *See id.* at 834. USCIS cannot and should not reasonably be expected to look beyond the plain language of the labor certification that DOL has formally issued or otherwise attempt to divine the employer's intentions through some sort of reverse engineering of the labor certification.

In this matter, Part H, line 4, 4-B, and 6 of the labor certification reflect that a master's degree in biology or related field with 84 months of work experience is the minimum level of education and work experience required. Part H, lines 8-A, 8-C, and 9 indicate that a bachelor's degree with eight years of work experience is an alternate level of education, and that a foreign educational equivalent is acceptable. At line 14, Specific skills or other requirements, the petitioner states:

> Related experience must include DNA sequencing and analysis; PCR mutagenesis; Immunoscreening of cDNA library; mouse and human expression of protein in Baculovirus; and Confocal and Fluorescent microscopy and imaging techniques.
>
> In alternate to a Master's and 7 years of experience or a bachelor's degree and 8 years of experience, employer will accept a PhD and 4 years of experience.

The beneficiary possesses a foreign bachelor's degree in science with a major in biology.[2] Thus, the beneficiary has the alternate minimum educational degree stipulated by the ETA Form 9089. The issue is whether the beneficiary meets the work experience requirements of the proffered job as set forth on the labor certification.

With regard to the beneficiary's work experience component, the petitioner, at Part H, line 10, "Is experience in an alternate occupation acceptable," marked "no." Further, the petitioner, at Part J, line

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[2] The petitioner submitted an academic equivalency report written by World Education Services, Inc. (WES) that states the length of the beneficiary's university studies was five years. The petitioner did not submit the beneficiary's academic transcripts from the Universitario Peruana de Cayetano Heredia in Lima; however it did submit the beneficiary's diploma. The WES evaluation report determined that the beneficiary's degree was the equivalent of a U.S. bachelor's degree.

21, marked "no" for whether the alien gained any of the qualifying experience with the employer in a position substantially comparable to the job opportunity requested. With regard to the beneficiary's work experience, Part K indicates the following work experience:

Job 1

[redacted]

Start and End Date: June 1, 2005 to September 8, 2006 (the date the beneficiary signed the document)[3]

Job 2

[redacted]

Start and End Date: October 21, 1999 to May 31, 2005

Job 3

[redacted]

Start and End date: December 15, 1996 to October 20, 1999

The record contains a letter of work experience signed by [redacted], Institute Nacional de Salud, dated September 7, 2005 that corroborates the beneficiary's prior work experience as a laboratory technician.[4] The petitioner in its response to the director's RFE dated February 1, 2007, submitted its internal recruitment report, copies of the newspaper advertisements for the proffered position;[5] a copy of an internal St. Jude Research Technical Staff Ladder that described the minimum requirements and approvals for the position of senior research technologist and research lab specialist,[6] and a two-page document that lists the percentages of time spent in the

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[3] Thus, based on the job descriptions in the ETA Form 9089, the beneficiary has prior work experience as a research lab specialist from June 1, 2005 to the December 28, 2005 priority date, or slightly less than seven months.

[4] In its response to the director's Request for Evidence (RFE), the petitioner also submitted a letter from [redacted] St. Jude Children's Research Hospital, dated March 21, 2007. Dr. [redacted] describes the beneficiary's skills with regard to the special requirements skills listed on the ETA Form 9089 at Part H, line 14; however, [redacted] does not indicate the period of time that the beneficiary has worked in her lab. Thus, [redacted] letter does not corroborate that the beneficiary began performing the duties of a senior lab specialist on June 1, 2005.

[5] The newspaper advertisements, in part, state: "MS degree in Biology or related field and minimum of 7 years experience in a similar laboratory environment. Alternatively, employer will accept a Bachelor's degree in Biology or related field and 8 years of experience in the job offered or in a similar laboratory research environment."

[6] This document states the minimum requirements for Research Lab Specialist, in pertinent part, are "Bachelor's plus 8 years of relevant post-degree experience, with at least 5 years experience at Sr.

job responsibilities of Senior Research Technologist and Research Lab Specialist positions and how the responsibilities for research lab specialist overlap or exceed those of senior research technologist.

In response to the director's RFE, the petitioner stated that at the time the application was filed PERM was a relatively new process and discrepancies between the electronic procedure and the regulation itself were common. The petitioner stated that it accepts experience in the job offered or "in a similar laboratory research environment." The petitioner states that counsel incorrectly checked 'no" at section H-10 because experience in a similar laboratory research environment was acceptable for the position. The petitioner also stated that the beneficiary did not possess the minimum requirements at the time of his initial hire by the petitioner but qualifies for the proffered position through experience gained with the petitioner "in an alternate dissimilar position," that of senior research technologist for the petitioner from October 21, 1999 to May 31, 2005. The petitioner stated that counsel correctly checked "no" to question J-21 because the beneficiary has not gained experience with the petitioner in a position substantially comparable to the job opportunity.

Counsel submits a copy of the petitioner's Tennessee Department of Labor and Workforce Development Job Order Transmittal form that states on page two that the petitioner "will accept a bachelor's degree in Biology or related field and 8 years of experience in the job offered or in a similar laboratory research environment." Counsel also submits a copy of the required posting notice for the proffered position that contains the same wording. Counsel asserts that USCIS should not be limited to the adjudication of properly completed electronic forms provided that the evidence submitted establishes that the employer tested the labor market adequately.

On appeal, counsel states the issue is whether the terms of the labor certification, as certified, must prevail even when the petitioner establishes that the position allows for alternate requirements and the evidence establishes the beneficiary meets the petitioner's alternate requirements. Counsel notes that the beneficiary has no degree above the baccalaureate level, but that he possesses a bachelor's degree in biology and eight years of experience in a similar laboratory research environment. Counsel notes that the director in his decision recognized that an inadvertent error was made, that the petitioner acknowledged the errors, and, that the beneficiary met the alternate requirements for the position of research lab specialist.

On appeal, counsel states that *Matter of Silver Dragon Chinese Restaurant,*19 I&N Dec. 401 (Comm. 1986) [7] does not limit USCIS's authority to adjudicate benefits solely on the job offer portion of the labor certification or establish that the USCIS lacks authority to find an applicant qualified for a position that would have been certified if the appropriate box had been properly checked on the ETA Form 9089. Counsel cites *Matter of Health America*, 2006-PER-1, a Board of

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Research Tech level."

[7] The AAO notes that *Matter of Silver Dragon Chinese Restaurant* refers to a third preference petition in which the beneficiary was a shareholder in the petitioner and had not revealed this fact to DOL during the certification process, and only peripherally addresses at 406 the division of authority between DOL and USCIS. Its findings do not include any consideration of whether USCIS can correct petitions based on typographical errors.

Alien Labor Certification Appeals (BALCA) case in which the Board addressed the issue of typographical errors in PERM applications made by attorneys or representatives. In citing *Health America,* counsel does not provide legal authority for the applicability of BALCA's precedent decisions to these proceedings occurring before the Department of Homeland Security. Nor does counsel submit how CIS's regulatory authority to verify the beneficiary's qualifications is obviated by the DOL. Further *Health America* refers to the inclusion of a wrong date on the ETA Form 9089, whereas the instant petition refers to not correctly identifying whether the beneficiary's years of work experience in a research laboratory environment would be acceptable alternate experience. More importantly, the AAO does not have jurisdiction to change the terms of the ETA Form 9089 even in cases involving typographical errors. The DOL, as the issuing agency for certified ETA Forms ETA 9089, is the only agency authorized to address this issue. Further the record contains no evidence that the petitioner communicated this error to DOL and whether the DOL authorized any official changes to the labor certification.

The AAO is bound by the Act, agency regulations, precedent decisions of the agency, and published decisions from the circuit court of appeals from whatever circuit that the action arose. *See N.L.R.B. v. Ashkenazy Property Management Corp.*, 817 F.2d 74, 75 (9th Cir. 1987) (administrative agencies are not free to refuse to follow precedent in cases originating within the circuit); *R.L. Inv. Ltd. Partners v. INS*, 86 F. Supp. 2d 1014, 1022 (D. Haw. 2000), *aff'd* 273 F.3d 874 (9th Cir. 2001) (unpublished agency decisions and agency legal memoranda are not binding under the APA, even when they are published in private publications or widely circulated). Accordingly, the petitioner has not established that the beneficiary had the minimum amount of work experience stated on the labor certification, and the petitioner may not be approved for this reason. The appeal is dismissed.

Beyond the decision of the director, the AAO notes that item J-21 on the ETA Form 9089 does not appear to be filled out correctly. This item denotes whether the beneficiary gained any of the qualifying work experience with the petitioner. If the petitioner wishes to establish that the beneficiary has the eight requisite years of prior work experience in the proffered job or in a similar laboratory research environment prior to the December 28, 2005 priority date, the beneficiary's corroborated three years of work as a laboratory technician with the Instituto Nacional de Salud in Lima, Peru from December 15, 1995 to October 20, 1999 and the beneficiary's claimed seven months of prior work experience as a senior lab scientist with the petitioner prior to the December 28, 2005 priority date is not sufficient prior work experience. These two periods of work experience only total three years and seven months of prior work experience.

In response to the director's RFE, counsel stated that the beneficiary qualified for the position of research lab specialist through experience gained with the sponsoring employer, which would support a response of "yes" at section J, item 21. Counsel then commented on the dissimilar nature of the two positions, and stated that section J, item 21, had been correctly filled out by noting "no." The AAO does not find counsel's assertions persuasive as to whether this item was correctly filled in by the petitioner.

The AAO notes that the petitioner's internal description of job duties for both jobs lists the same duties but indicates that some duties would be performed less by the more senior research lab

specialist position, and that the research lab specialist position performed more senior duties not performed by the senior research technologist. Nevertheless, all job duties appear to be performed in conjunction with work in a similar research laboratory environment, a phrase that the petitioner claims was incorrectly omitted from the ETA Form 9089. In sum, it appears that the beneficiary's work experience with St. Jude is qualifying experience and the petitioner should have indicated "yes" in section J, item 21.[8]

Beyond the decision of the director, the AAO also notes that [redacted]'s letter of work verification does not specifically address the dates of the beneficiary's employment with the petitioner either as a senior research technologist or a senior lab technologist. In order to corroborate this employment, the petitioner needs to submit a letter with more specific dates as to the beneficiary's claimed employment in both positions. The record also does not contain the beneficiary's transcript of his university level studies upon which WES based its academic equivalency report. *See* C.F.R. § 204.5(k)(3)(i).

The AAO concurs with the director's decision that the petitioner has not established the beneficiary possessed eight years of prior work experience based on one incorrectly filled out item on the ETA Form 9089 and would question whether the petitioner filled out another item with regard to qualifying experience on the same form. The AAO also notes the petitioner's lack of corroborating evidence as to the beneficiary's prior employment with the petitioner. For these reasons, considered both in sum and as separate grounds for denial, the petition may not be approved. The AAO notes that the petitioner may file a new I-140 petition with a new accompanying ETA Form 9089 correctly completed and certified without prejudice.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER. The appeal is dismissed.

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[8] The DOL FAQ website on page 18 does not preclude the beneficiary from obtaining the requisite work experience from the petitioner; however, it does stipulate that if the beneficiary is already working for the petitioner, the petitioner cannot require U.S. workers to have more work experience than what a beneficiary would have at the time of initial hire, with two exceptions to this issue. *See* page 18 of DOL PERM FAQS at http://www.foreignlaborcert.doleta.gov/perm.cfm (available as of October 22, 2009.)